IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HANS EDWARD SOLUM, JR. & SUSAN B. SOLUM	:	**CIVIL ACTION**
v.	:	
HOWARD YERUSALIM, et al.	:	**NO. 98-4056**

MEMORANDUM and ORDER

Shapiro, S.J. **June 16, 1999**

Plaintiffs Hans Edward Solum and Susan B. Solum, parents of decedent Alison Leah Solum, filed this action against 23 individual defendants, employed by the Commonwealth of Pennsylvania, and the Borough of Chester Heights ("Borough"). They allege a cause of action under 42 U.S.C. § 1983 as a result of the death of their daughter in an automobile accident. Defendants have moved to dismiss the complaint. For the reasons stated below, defendants' motions will be granted.

FACTS

Alison Leah Solum was killed in a tragic automobile accident at 9:10 p.m. on August 7, 1996, on Baltimore Pike (Route 1), in Chester Heights, Pennsylvania. Baltimore Pike is a four lane divided highway, with the sides separated by a "low loped concrete mountable divider."

While Ms. Solum was driving south, another driver, Anthony Cifelli, driving north, encountered a vehicle stopped on his side of the road waiting to make a lawful left turn. In avoiding the

stopped vehicle, Cifelli swerved, traveled over the divider, and struck the Solum vehicle.

Plaintiffs filed suit against certain employees of the Pennsylvania Department of Transportation (collectively the "Commonwealth defendants"). They allege that the poorly designed road was unsafe, and that the Commonwealth defendants knew it because since 1991 over 1,000 serious bodily injuries were reported on that stretch of highway. Plaintiffs added the Borough of Chester Heights ("Borough") as a defendant because it allegedly knew of the problems and failed to exercise its police powers under 75 Pa. Stat. Ann. § 6101, et seq., to repair the state road.

Plaintiffs claim defendants' failure to design, construct, or maintain the road in a safe condition deprived them of "their liberty interest in the continued association with their daughter" under the Due Process Clause of the United States Constitution.[1] Defendants have moved to dismiss the complaint.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the

[1] The Borough mentions that the decedent's estate previously settled a state court action against the driver and others. For purposes of this motion, the previous litigation will not be considered.

court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45 (1957).

II. Liberty Interest of a Parent in the Life of an Adult Child

To assert a § 1983 cause of action, plaintiffs must plead a violation of a constitutionally protected interest. 42 U.S.C. § 1983. The Court of Appeals has recognized the liberty interest a parent has in the life of a minor child. See Estate of Bailey v. County of York, 768 F.2d 503, 509, n.7 (3d Cir. 1985)(overruled on other grounds). This interest stems from the parents' custody and interest in maintaining the family. See id. The court has not addressed whether that interest extends to the life of a child no longer a minor. See Freedman v. City of Allentown, 853

F.2d 1111, 1117 n.5 (3d Cir. 1988).

In Estate of Bailey, the Court of Appeals cited with approval Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984). See Estate of Bailey, 768 F.2d at 509, n.7. Bell found parents have a constitutional liberty interest in their relationship with their children based on their "interest in the companionship, care, custody, and management" of the children. Bell, 746 F.2d at 1244-1245. Recognizing that the interests involved did not change based on the age of the child, the Bell court specifically rejected limiting parental interest to a minor child; the child's age and dependence on the parents were factors a jury could consider in determining the amount of damages. See id. at 1245; see also Estate of Cooper v. Leamer, 705 F. Supp. 1081, 1087 (M.D. Pa. 1989)(parents could recover loss of interest in son's life regardless of age and residential status); Agresta v. Sambor, 687 F. Supp. 162, 164 (E.D. Pa. 1988)(parents stated cause of action under § 1983 despite age and marital status of son). The Court of Appeals will more likely than not recognize parental liberty interests in the relationship with a child regardless of age. The Solums had a liberty interest in the life of their daughter.

III. Liability Elements of § 1983

To maintain a civil rights action, plaintiff must allege: 1)

action by the state or governmental entity; 2) deprivation of a constitutional right; and 3) causation. See 42 U.S.C. § 1983;[2] City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)(per curiam); Kneipp v. Tedder, 95 F.3d 1199, 1212 n.26 (3d Cir. 1996). Since this court finds plaintiffs were not deprived of a constitutional right, it will not address the issue of causation.

A. Governmental Action

1. Commonwealth Defendants

State action exists if a defendant's "official character is such as to lend the weight of the State to his decisions." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982). Here, the Commonwealth defendants design and maintain roads for the Commonwealth of Pennsylvania; state action is present. Because they are sued in their individual capacities, they are not entitled to Eleventh Amendment immunity.

2. Municipal Defendant

Municipalities act in a governmental capacity through the

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[2] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

policies and customs they promulgate. They may deprive a person of a constitutional interest only through an official policy or custom permitting or requiring the municipal agent's action. See McMillian v. Monroe County, --U.S.--, 117 S. Ct. 1734, 1736 (1997); Monell, 436 U.S. at 491. "Policy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict. A course of conduct is considered to be a 'custom' when, though not authorized by law, 'such practices of state officials [are] so permanent and well settled' as to virtually constitute law." Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996), cert. denied, 117 S. Ct. 1086 (1997),(quoting Andrew v. City of Phila., 895 F.2d 1469, 1480 (3d Cir. 1990)). Plaintiffs allege a Borough policy or custom of not maintaining Route 1 safely; if proved, it would constitute state action for § 1983 liability.

B. Deprivation of a Constitutional Right

Due Process "does not transform every tort committed by a state actor into a constitutional violation." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989). In DeShaney, the guardian for a minor child sued the county Social Services Department for not removing the child from his father's custody despite indications that the father abused the

child. The child was subsequently brain damaged by his father's beatings. The Supreme Court held the county not liable for failing to intervene on the child's behalf. See id. at 202. The DeShaney Court emphasized that the Constitution acts as a restriction on state action; the state has no duty to protect its citizens from private actors, so state actors are not liable for failure to act. See id. at 195-97.

DeShaney and subsequent cases recognize two exceptions where there may liability for failure to act: 1) a custodial relationship between plaintiff and the government actor; or 2) a state-created danger. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997)(action dismissed because school district could not have foreseen that decedent would be shot by mentally unstable person if door to school building were left open). Here, there is no contention of a custodial relationship; liability is premised on a state or municipality created danger.

The Court of Appeals explored the "state-created danger" theory, but did not adopt it, in Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995). In Mark, plaintiff sued a municipal fire company for failure to screen volunteer firefighter applicants after one volunteer firefighter set fire to plaintiff's business; he contended the volunteer would not have been hired had defendant required psychological testing. The court affirmed dismissal of the action because the volunteer

firefighter was a private actor, not one "clothed with the authority of state law," id. at 1150; it refused to adopt a "state-created danger" theory on those facts. See id. at 1153. In the Mark case, the general public was exposed to the possibility of injury by the firefighter; the court required a discrete plaintiff vulnerable to a foreseeable injury. See id.

The "state-created danger" theory was adopted n Kneipp, 95 F.3d at 1208. In Kneipp, plaintiff and her husband, visibly intoxicated, were returning from a tavern at night. They were stopped by police officers and separated. The officers allowed plaintiff's husband to go home, but would not permit plaintiff to leave. Later, they left plaintiff to find her way home alone, but she fell in a ditch and suffered permanent brain damage. The Kneipp court held that whether the police officers created the danger to plaintiff by removing plaintiff from the care of her husband and forcing her to go home alone, something she was obviously unable to do, was a material issue of fact for a jury. See id. at 1209, 1211.

A four part test determines whether D's actions may constitute a "state-created danger": 1) foreseeable and fairly direct harm; 2) wilful disregard of the harm to the plaintiff by the government actor; 3) a relationship between plaintiff and defendants; and 4) use of defendants' authority to create a danger that otherwise would not have existed. See Morse, 132

F.3d at 908; Kneipp, 95 F.3d at 1208.

1. Foreseeable and Direct Harm

A jury must find the harm caused to Alison Solum was foreseeable and direct. On this motion to dismiss, whether it is foreseeable that drivers on Route 1 exceed the speed limit or drive in an otherwise unlawful fashion may be an issue of fact. But the harm caused to Alison Solum and the manner in which it occurred, as distinct from accidents in general, might not be foreseeable. See Morse, 132 F.3d at 908-09.

In Morse, decedent's estate alleged the school district violated decedent's civil rights when it made no effort to enforce its policy requiring that the school building be closed and locked. Decedent was shot by a mentally unstable third party who entered the building by an open door. The court, applying the elements adopted in Kneipp, held that the defendants could not have foreseen that plaintiff's murder by a mentally unstable person because of an open door. See id. at 908.

The Morse court did not analyze the situation based on general harm that could result if someone entered the school building through the open door; it considered the specific acts of the particular private party inflicting the harm and defendants' knowledge of the situation. See id. The court also found the causal connection between the defendants' act of leaving the door open and the attack too attenuated to impose

liability. See id. at 909.

The harm caused here is even less direct than in Morse. The lack of causal connection between the injuries and defendants' failure to act is more attenuated than in Morse, because the parents bring the action, not the decedent; the harm caused to decedent's parents is even less foreseeable and direct in the absence of defendants' ability to foresee the specific victim, her family situation, and the manner and means of the harm.

2. Wilful Disregard

Plaintiffs must establish that defendants were deliberately indifferent by acting in wilful or reckless disregard of the rights of Alison Solum's parents. According to the complaint, defendants had ample notice of the danger presented by the current construction of Route 1; there were over 1,000 reports of accidents on Route 1 in the vicinity of this accident. There might be a factual issue whether the alleged actions of defendants were done with deliberate indifference to the harm caused the traveling public.

3. Relationship Between Plaintiffs and Defendants

If the defendant does not have specific knowledge of the particular plaintiff, no relationship imposing liability exists. See Mark, 51 F.3d at 1152. The foreseeable plaintiff may be an individual or a discrete class, but government action or inaction with respect to the general public does not fall within the

purview of § 1983. See Morse, 132 F.3d at 913. Liability is limited to individuals or a discrete class because:

> Where the state actor has allegedly created a danger towards the public generally, rather than an individual or group of individuals, holding a state actor liable for the injuries of foreseeable plaintiffs would expand the scope of the state-created danger theory beyond its useful and intended limits. Where ... the allegedly unlawful acts of the state actor affect only a limited group of potential plaintiffs, the potentially broad reach of the state-created danger theory is constrained by examining whether the plaintiff or plaintiffs were "foreseeable" victims.

Morse, 132 F.3d at 913, n.12.

A “discrete class” is a group of plaintiffs reasonably identifiable. Naming the class is not enough; the class must be distinguishable from the public in general. Here, plaintiffs assert that the discrete class of plaintiffs involved in this action are drivers of the stretch of Route 1 where the fatal accident occurred. However, “drivers on Route 1" involves the general population not a discrete class, and plaintiffs are not even the drivers but the parents of a driver on Route 1.

No reason exists for providing recovery to drivers and not passengers, so the class would be even larger than that defined by plaintiffs. To permit plaintiffs to recover, the class would be defined as “travelers along Route 1 and their parents.” Route 1 is a major traffic artery traveled by thousands daily, and this class contains an unquantifiable and virtually unidentifiable mass of potential plaintiffs. Such a class would not constrain

"the potentially broad reach of the state-created danger theory." Id.; see also Mark, 51 F.3d at 1153 (people coming in contact with violent firefighter not a discrete class). Plaintiffs fail to state a cause of action for a "state-created danger" to discrete members of a class other than the general public.

4. Opportunity Created by Defendants

Plaintiffs must also prove that defendants acted affirmatively to create a danger or an opportunity for harm that otherwise would not have existed. See D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1373 (3d Cir. 1992)(violation insufficient to state § 1983 claim if state actor did not act affirmatively).

The complaint asserts defendants failed to act in a number of ways, including: not correcting or redesigning the road; not reducing the speed limits; and not prohibiting left turns at certain intersections. But the defendants did not construct Route 1; the problem plaintiffs allege is that defendants did not correct the current state of Route 1.

The only truly affirmative action alleged is that some of the defendants directed that highway funds be used for purposes other than the repair of Route 1. "Decisions concerning the allocation of resources to individual programs ... involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the

basic charter of Government for the entire country." Collins v. City of Harker Heights, 503 U.S. 115, 128-29 (1992). There is no liability for a state-created danger.

Plaintiffs' complaint attempts to convert a very unfortunate automobile accident into a constitutional claim. While the events complained of had tragic consequences, no defendants affirmatively created a danger within the scope of DeShaney and subsequent decisions. Defendants cannot be held liable for the actions of which plaintiffs complain. The solution to a situation like this is through the political not the judicial process.

CONCLUSION

Plaintiffs, as parents of the decedent, have standing to bring this § 1983 action, but the motions to dismiss must be granted. Taking the allegations of the complaint as true, plaintiffs' complaint does not state a cause of action against either the Commonwealth defendants or the Borough. The plaintiffs do not fall within a discrete class, nor did the defendants act affirmatively to deprive them of their constitutional rights.

An appropriate Order follows.

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ORDER

AND NOW, this 16th day of June, 1999, upon consideration of defendants' motions to dismiss and all responses and replies, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The motion to dismiss of defendants Howard Yerusalim, Bradley L. Mallory, Larry M. King, Gerald R. Fritz, Thomas E. Teneyck, William R. Moyer, Michael M. Ryan, Fred W. Bowser, Mahandra G. Patel, Gary L. Hoffman, Amar Bhajandas, Thomas E. Bryer, Andrew Warren, Carl Keefer, Vito Genua, Douglas May, Werner Eichorn, Elaine Elbich, Tim O'Brien, Barry Snyder, Stephen B. Lester, and Michael Girman is **GRANTED**.

2. The motion to dismiss of defendant Borough of Chester Heights is **GRANTED**.

3. The motion to dismiss of defendant Bruce Rowe is **GRANTED**.

4. Pursuant to the order dated January 14, 1999, plaintiffs shall respond to the outstanding motion for sanctions within five (5) days of service of this Memorandum and Order.

Shapiro, S.J.